Upon initial investigation of the case, Dillon entered the apartment that had been occupied by the victim as well as another apartment; not petitioner's apartment (H-3, p. 5). A warrantless search was conducted of the above premises (H-3, p. 6) at this time, but Dillon personally did not remove any physical evidence (H-3, p. 7). He did recall, however, seeing a towel at the Public Safety Building although it was never ascertained exactly where the towel came from (H-3, pp. 8, 15).

Petitioner then again took the stand and testified that he had asked Dillon "to have the right to an attorney" twice (H-3, p. 11) - once when Dillon was asking questions regarding defendant's background (H-3, pp. 11-12) and once while Dillon was talking about getting the electric chair back into use in New York (H-3, p. 12). At this point, Dillon allegedly stated "you will get an attorney in the morning (H-3, p. 12) (upon arraignment)" (H-3, p. 20).

Upon interrogation by Hunter, petitioner went on to state that Hunter exhibited a towel before him and stated: "Look Mulcahy, we have got the towel." (H-3, p. 13). However, he openly admitted that Sgt. Hunter had fully advised him of his rights before he began questioning (H-3, p. 13; see more particularly H-3, pp. 21-22); that he was unable to identify the towel (H-3, pp. 14-15); that Hunter did not ask him if it was his towel (H-3, p. 15); that Hunter did not tell him that the towel had been involved in the murder (H-3, p. 15); that Hunter neither told him that the blood of the victim had been found on the towel nor had he related where the police had obtained the towel (H-3, p. 15). Once again, the petitioner admitted that he did not recognize it as one of his towels (H-3, pp. 15-16) and that he did not see any stains on the towel that could have been blood (H-3, p. 16). During Hunter's interrogation, petitioner testified that he mentioned to Hunter that "I should have an attorney present for this;—I mentioned it to him just

slightly....I believe I mentioned to Sergeant Hunter that I would have liked to have an attorney present" (H-3, p. 22). Hunter allegedly said nothing to this remark and walked out of the room and later on came back with the towel (H-3, p. 22).

I

THE DECISION BELOW IS CORRECT AND THERE IS NO CONFLICT OF DECISION.

The Court below holding that petitioner's confession was voluntary did not deprive him of due process of law in accordance with the 14th Amendment of the Constitution. The factual findings by the Court below as to the voluntariness of petitioner's confession have substantial support in the Record and justified the legal conclusions drawn by that Court.

The "issues" raised by petitioner are questions of fact that he seeks this Court to decide in his favor. Petitioner has, however, gone to great lengths in attempting to convert these factual questions into legal and Constitutional questions in an attempt to justify review by this Court on Certiorari. However, there are no important questions of Federal law requiring decision by this Court.

. . . as to the Pre-Indictment custodial interrogation of Petitioner.

Petitioner would lead this Court to believe that in Spano v. New York (360 US 315), it "held" that police interrogation is to be limited to unsolved cases. However, that which Spano states is that a post-indictment lengthy and continuous interrogation of a defendant held incommunicado "must be examined with the most careful scrutiny". Clearly, there was no such lengthy interrogation of the petitioner in this post-arrest, pre-indictment situation where the police were attempting to solve a

crime. Questioning suspects is indispensable in law enforcement as long as such detention and examination is not coercive (Culombe v. Connecticut, 367 U.S. 568). A review of the record clearly demonstrates that such "detention and examination" was not coercive and that petitioner knowingly and voluntarily waived his constitutional rights.

. . . as to the Voluntariness of Petitioner's confession.

Petitioner seeks to urge that this Court rule that once a suspect has proclaimed his innocence all police questioning must cease. To do so would, effectively, exclude confessions from the judicial process, and require this Court to overturn its holding in Miranda v. Arizona, (384 U.S. 436):

> (W)e do not find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, or course, admissible in evidence....Volunteered statements of any kind are not barred by the Fifth Amendment ... (at 478).

A review of the "totality of circumstances" surrounding the statements made by the petitioner discloses that his statements were the product of a free and rational choice. Petitioner was certainly not deceived by a misstatement of fact, nor by his own testimony was his confession the result of force or threats. There were no promises made, by the petitioner's own testimony, which would create a substantial risk that he might falsely incriminate himself.

Moreover, petitioner's claim of alcohol withdrawal symptoms at the time of his confession does not ipso facto render his confession invalid. The petitioner's will had not been overborne by the interrogation (Townsend v. Sein, 372 U.S. 293, 307) and his "level of

intoxication" had not risen to a degree of mania (People v. Schompert, 19 N. Y. 2d 300; see also Blackburn v. Alabama, 361 U.S. 199). It should be noted that petitioner's counsel stipulated that his client was "normal" as opposed to being "intoxicated" based on a doctor's examination several hours after the interrogation concluded (H-2, p. 4).

As the record so conclusively establishes, at no point in time did Sergeant Hunter deceive the petitioner. Indeed, if deception was at all employed, it certainly was not utilized to a degree of depriving petitioner of due process of law (cf: U.S. ex rel. Everett v. Murphy, 329 F.2d 68).

It is clear that petitioner's confession resulted from a free and rational choice on his part to make a statement after having been fully and effectively advised of his constitutional rights.

. . . as to incrimination and right to counsel.

In regard to petitioner's claim that the police refused to impliment his constitutional rights, it is respectfully submitted that by his own testimony, as well as the several prosecution witnesses who testified, petitioner neither indicated in any manner that he wished to consult with an attorney before speaking, nor did he indicate in any manner that he did not wish to be interrogated. Concededly, if he had effectuated either of these rights, the questioning must have terminated. Certainly, this is not the case here.

Petitioner's claims in this area are nothing more than an attempt to engage this Court as arbitrator in a "contest of veracity between the police and himself", a point which has already been decided against him by the County Court. Moreover, that decision is overwhelmingly supported in the record (see People v. Leonti, 18 NY2d 384; cert. den. 389 U.S. 1007).

. . . as to waiver of rights.

Upon the record, it is clear that petitioner had been fully and completely advised of his rights, that he made a knowing and intelligent waiver of his rights and that the admissions were fully and voluntarily given. In line with the well recognized mandate that for a waiver to be effective it must be established that there was "an intentional reliquishment or abandonment of a known right or privilege" (Johnson v. Zerbst, 304 U.S. 458, 464). The record is unequivocal in this regard. While in custody, petitioner was given a full and effective warning of his rights. He was aware of his right to consult an attorney before being interrogated. He was also aware of his right to remain silent and that anything he said could be used against him. In these circumstances, the constitutional safeguards laid down by this Court in Miranda v. Arizona (384 U.S. 436) during a period of custodial interrogation have been effectively waived.

. . . as to his confession being the product of an "illegal search and seizure".

Only a victim of an illegal search and seizure has standing to move to suppress or to object on that ground (Alderman v. United States, 394 U.S. 165). In order to be a victim, the petitioner must own, occupy or control either the place searched (or be legitimately on the premises when the search occurs) (Simmons v. United States, 390 U.S. 377), or the object which was seized (People v. Estrada, 23 N.Y. 2d 719; cert.den. 394 U.S. 953). Clearly, petitioner lacked the requisite standing to move to suppress the allegedly illegally seized towel since by his own admission he denied ownership or recognition of the towel (H-3, pp. 14-16), never established from where the towel was procured and failed to attempt to move to suppress the towel.

. . . as to the Petitioner's plea to the reduced charge.

After the Court had recessed on the second day of jury selection, the District Attorney made a statement for the record. In the presence of the Judge, the petitioner, his attorney, and his parents, the District Attorney renewed his offer of a reduced sentence to accept a plea to a lesser offense in full satisfaction of the indictment to the petitioner in exchange for a guilty plea and furthermore that if the bargain was refused at this time, he would not renew it and would prosecute on all charges in the indictment. The next morning the the offer was accepted. The petitioner now alleges that this deprived him of his right to counsel.

The applicable requirements for a guilty plea (i.e. voluntary and intelligent) mandated by this Court in U.S. v. Jackson (390 U.S. 570) were fully satisfied. Applying, the "voluntary" tests set out in Brady v. United States (397 U.S. 742), it is clear that there was no harassment, misrepresentation, bribery, or mental coercion overbearing petitioner's will. The New York Court of Appeals has properly equated the term "undue pressure" with this Court's aforementioned Brady proscriptions (People v. Montgomery, 27 N.Y.2d 601; see also People v. Flowers, 30 N.Y.2d 315 - an extreme example of coercion or undue pressure occurring when a defendant, to avoid being further abused or beaten, pled guilty to a lesser charge to obtain a prison transfer).

Obviously, no allegation of such coercion or undue pressure is made and neither did the Respondent "overbear the will of the petitioner". In fact, the Court below told the petitioner that it would not accept a guilty plea if it was motivated by coercion (Plea Minutes, page 2):

> THE COURT: Do you want to stand up against the end of the table? Before any plea is entered, Mr. Mulcahy, I want to get one thing straight on the record. I won't accept this plea if you feel there has been any ultimatum issued by the District

Attorney. All he told you was if this case was to be settled by way of plea, it had to be done this morning before he got down to subpoena all his witnesses. Is that understood?

THE DEFENDANT: Over the course of ten months, I have had more than enough time to weigh this over and will enter this plea with that understanding that you have mentioned.

THE COURT: Very well.

The "intelligent" tests set forth by this Court in Brady were, again, fully satisfied. The petitioner was represented by counsel, he was aware of the nature of the charge and potential sentence, and he was in control of his mental faculties.

Therefore, the plea was voluntary and intelligently made in accordance with the standards mandated by this Court and applied by the New York courts.

CONCLUSION

FOR THE FOREGOING REASONS, IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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